United States Court of Appeals

for the Second Circuit

RESPONSE TO CROSS APPEAL

77-7158

To be argued by
DONALD F. DRIVER

In The

United States Court of Appeals

For The Second Circuit

KATHLEEN G. O'GEE,
Plaintiff-Appellee,

-against-

DOBBS HOUSES, INC.,
Defendant and Third Party Plaintiff-Appellant,

-against-

UNITED AIR LINES, INC.,
Third Party Defendant-Appellee and Cross-Appellant.

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SECOND CIRCUIT

On Appeal from the United States District Court for the Eastern District of New York.

BRIEF FOR THIRD PARTY DEFENDANT-APPELLEE AND CROSS-APPELLANT UNITED AIR LINES, INC.

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KATHLEEN G. O'GEE,

Plaintiff-Appellee,

- against -

DOBBS HOUSES, INC.,

Defendant and Third Party
Plaintiff-Appellant,

- against -

UNITED AIR LINES, INC.,

Third Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF AND BRIEF OF CROSS-APPELLANT UNITED AIR LINES, INC.

Preliminary Statement

This brief is submitted in reply to and in opposition to so much of defendant and third-party plaintiff-appellant Dobbs Houses, Inc.'s (hereinafter referred to as Dobbs) claimed issue that the verdict in favor of third-party defendant-cross-appellant United Air Lines, Inc. (hereinafter referred to as "United") and against Dobbs was contrary to the weight of the evidence.

This brief is also submitted as a cross-appeal by United from that portion of the final judgment which denied United's claim seeking recovery of the cost of defense including attorney's fees. Judgment was entered in the captioned action on March 11, 1977 after a trial by jury in the United States District Court for the Eastern

District of New York.

This action involved a claim by plaintiff-appellee, a United flight attendant, against Dobbs to recover damages for injuries she sustained while working aboard one of United's flights. Plaintiff claimed that Dobbs was negligent in not properly securing a cold food "buffet" in the galley of the aircraft. The "buffet" became loose in flight and plaintiff sustained injuries in her attempts to move the "buffet" back into place.

Dobbs impleaded United as a third-party defendant to recover common law indemnity solely on the ground that United was negligent in training its personnel or in the maintenance and repair of its equipment. United counter-claimed against Dobbs to recover the cost of defense including attorneys' fees on the ground of common law indemnity and a specific indemnification provision contained in a written agreement entered into between Dobbs and United.

After a jury trial on the merits, judgment was entered in favor of plaintiff against Dobbs. The third-party complaint and counterclaim were dismissed by the Court.

Statement of the Issue on Appeal

That the verdict in favor of United and against Dobbs as to Dobbs' third-party complaint was pursuant to the weight of evidence and should be sustained and affirmed.

Statement of the Issue on Cross-Appeal

The issue before this Court on this cross-appeal is whether the District Court erred in dismissing United's counter-claim against Dobbs to recover the costs, expenses and attorneys' fees incurred by it in the defense of the third-party action. The gravamen of the

counterclaim was grounded upon the indemnification provision contained in a written agreement entered into between Dobbs and United and upon principles of common law indemnity.

Jurisdiction

The final judgment of the United States District Court, Eastern District of New York, Weinstein, J., in favor of plaintiff in the sum of $170,000.00 against Dobbs Houses, Inc. and further dismissing the third-party complaint and United's counterclaim entered on March 10, 1977 was filed on March 11, 1972. (3a)* A Notice of Appeal was filed by Dobbs Houses on April 7, 1977 and a Cross-Notice of Appeal was filed by United on April 19, 1977 within fourteen days from the filing of the Notice of Appeal as required by Rule 4(a) of the Federal Rules of Appellate Procedure. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1291. No opinion was rendered by the Court below.

Statement of the Case

Plaintiff, while in the course of her employment as a flight attendant for United, claims to have sustained personal injuries while working aboard United Flight 476 bound from Atlanta, Georgia to New York, New York on April 23, 1972 (8a-9a). Plaintiff claimed that she sustained such injuries (38a) during the course of her attempts to reposition a food "buffet" (136a-143a) which had come loose as the result of Dobbs' failure to properly secure the "buffet" in the aircraft's galley. She commenced an action against

---

* Unless otherwise indicated all references are to pages of the Joint Appendix.

Dobbs Houses who subsequently impleaded United seeking common law indemnity from United. United counter-claimed against Dobbs Houses pursuant to an indemnity provision contained in written contractual agreement in effect between United and Dobbs (613a-617a).

This contract required Dobbs to perform certain catering and related services for United's flights arriving at and departing from the Atlanta, Georgia Airport. Included as part of these services was the off-loading of empty "buffets" and the onloading and securing of full "buffets" aboard United aircraft (399a-403a).

The off-loading of empty "buffets" and the on-loading and securing of full "buffets" aboard United aircraft by Dobbs were to be performed in strict compliance with procedures United gave to and admittedly received by Dobbs. The appropriate procedures are contained in United's Ramp Service Manual (612a) and Dobbs admittedly was to use these procedures in the training of its employees and in the actual performance of the operations of off-loading and on-loading the buffets (411a-412a).

Plaintiff contended that Dobbs Houses' employees were negligent in that they did not secure, or make sure that the cold food "buffet" was secure as required in the performance of their duties while the aircraft in question was on the ramp at the Atlanta, Georgia Airport. The "buffet" subsequently became loose during take-off and plaintiff was injured while attempting to push it back into place after the aircraft assumed level flight (136a-143a). Plaintiff testified that the levers which secure the "buffet" were in an up position after the "buffet" was put back in place and that she then placed the levers in the down position (236a-238a). The

significance of the positioning of the levers is that when in the up position the locking device is disengaged and when in the down position, the locking device is engaged and the "buffet" is secure (337a). Plaintiff further testified that the "buffet" remained secure during the remainder of the flight (143a). The "buffets", the locking devices and the tracks upon which the "buffets" were placed aboard the aircraft were owned by United (273a-274a, 366a-368a). The "buffets" were used interchangeably and would be cleaned and inspected by Dobbs Houses, United or some other entity as the occasion arose. (414a-416a).

Upon loading the full cold food "buffet" into the aircraft's galley, United's Ramp Service Manual requires Dobbs to have two men push the unit firmly and squarely until the floor latches snap into the locked [down] position (447a). While the locking device was designed to be automatic, Dobbs admitted and conceded at the trial that the floor latches do move between the time they are depressed before the "buffet" is introduced on the track up to and until the time that the "buffet" is fully within its compartment. "They move from one position to another position" [i.e., down to up, etc.] (448a).

As an added safety precaution, United's Ramp Service Manual further provided as follows (612a):

> "3) After the buffets are locked into position:
>
> c) Pull oven door and lower tray compartment door handles to be sure both moveable buffets are latched in place. Visually check all 4 floor latches to assure that handle end is down." [emphasis added].

Though Dobbs' safety and training manager testified that

the check to make sure that the handle ends were down was to avoid a situation where the handle ends were up - thus allowing the "buffet" to come sliding out (446a), he then stated that:

> "We just look at them [the handles to the floor latches] to make sure. It's just an extra safety precaution (445a)."

Dobbs Houses' claim to recover common law indemnity from United is premised upon the sole allegation that United was negligent in the training of its personnel or in the maintenance and repair of its equipment.

The trial of the action commenced on March 3, 1977 and on March 10, 1977, the jury rendered its verdict in favor of the plaintiff for $170,000.00 and, upon interrogatories directed to each juror, it was unanimously found that Dobbs Houses was 100% negligent and that plaintiff and United were 0% negligent respectively (511a-513a).

United's post-trial motion for judgment on its counterclaim seeking cost of defenses and attorneys' fees as against Dobbs Houses was denied with leave to reargue (516a-517a) and all of Dobbs Houses' post-trial motions were also denied.

The law of Georgis is the law of the case (257a-262a).

The issue involved on this cross-appeal is whether, as a matter of law, the Court below erred in dismissing United's counterclaim to recover the costs, expenses and attorneys' fees incurred by United in its defense of the third-party complaint.

ARGUMENT

POINT I

Dobbs' Contention on Appeal that the Verdict in Favor of United and Against Dobbs Lacks Merit and that Said Verdict in Favor of United Should be Affirmed.

Dobbs contends that a new trial should be had on Dobbs' claim against United for common law indemnity or contribution on the ground that it was against the weight of the evidence for the jury to render a verdict in favor of United against Dobbs. It is respectfully submitted that Dobbs' contention is totally without merit.

To support its contention, Dobbs states that United owned the "buffet", tracks and locking device upon which the "buffet" operated; that the lever on either side of the tracks must be in a down position to lock the buffet, that there is an automatic locking device and that United maintained its equipment[1]. United has no argument to the above. However, this sole contention must fail in the uncontradicted light of the evidence.

The evidence is clear that Dobbs performed or should have performed the operations of off-loading and on-loading "buffets" from and on United's aircraft pursuant to the requirements and procedures contained in United's Ramp Service Manual (411a-412a) and that, in said Ramp Service Manual, there was a specific written instruction that the servicemen were to visually check all four floor latches to assure that the handle ends are down (612a).

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1. Brief of Defendant and Third Party Plaintiff-Appellant, pp. 15-16.

It is equally clear that Dobbs knew that the latches or handles moved up and down during the process of loading the "buffet" (448a) and that United's "safety precaution" was to make sure that the handle ends were down (locked) to avoid the situation where the "buffet" would come sliding out if the handle ends were up (446a). Despite this knowledge, evidence was adduced that Dobbs personnel were to merely "look at the levers" (445a).

Uncontroverted evidence further clearly shows that after the "buffet" was put back into place, the plaintiff stepped on the levers to place them in the locked position (236a) and that the "buffet" never slid out after it was locked in place (143a) and that no malfunction of the "buffet" or the components in the aircraft had occurred (566a-602a). Dobbs was also late in loading that day (131a).

From all the foregoing, it is respectfully submitted that the evidence adduced did indeed clearly warrant the jury verdict in favor of United and against Dobbs.

Accordingly, the jury's verdict that United was not negligent in any respect herein should be affirmed and that so much of Dobbs' appeal that a new trial be had on the issue of United's negligence should be completely denied on the ground that it totally lacks merit.

Parenthetically, by the terms and provisions contained in the catering agreement in effect between United and Dobbs (613a-617a) [which is more fully discussed infra], it is manifestly clear that Dobbs agreed to assume the risk of any negligence on United's part, if any, in Dobbs' performance of the catering agreement. Accordingly, United would not be liable to Dobbs on the ground of common law indemnity or contribution. See Camp Concrete Products v. Central of Ga. Ry. Co., 134 Ga. App. 537, 215 S.E.2d 299 (Ct. App. Div. 1, 1975); Pinkerton & Laws Co. v. Robert

& Company Associates, 129 Ga. App. 881, 201 S.E.2d 654, 657 (Ct. App. Div. 2, 1973).

POINT II

The District Court, As a Matter of Law, Erred in Dismissing United's Counterclaim Against Dobbs Houses

After the trial of this action, the jury unanimously found that Dobbs Houses was 100% negligent in the loading and securing of the "buffet" in question and that plaintiff sustained injuries as the result of Dobbs Houses' sole negligence. Accordingly, the Court below clearly erred in denying United's counterclaim against Dobbs Houses for indemnification of costs, expenses and attorneys' fees incurred in the defense of the third-party complaint.

Dobbs Houses is an international organization which provides food catering services in 63 locations in the United States and 25 locations in foreign countries (395a) for various airlines in cities in which these airlines do not maintain their own catering services or food kitchens.

United maintains flight schedules to and from Atlanta, Georgia to and from points throughout the United States, however, United does not maintain its own catering or flight kitchen services in Atlanta, Georgia. Accordingly, United and Dobbs Houses entered into a catering agreement (613a-617a) whereby Dobbs Houses was to perform catering and related services on behalf of United. Included in the related services is the off-loading of empty "buffets" from United's aircraft, the cleaning and inspection of "buffets" and the subsequent onloading and securing of full "buffets". (411a-416a).

Plaintiff contended that Dobbs Houses' employees, in the course of their duties, were negligent in failing to secure the cold food "buffet" in the aircraft's galley, thus causing it to become loose

and subsequently causing her injuries. The jury agreed with plaintiff's contentions. No negligence whatsoever was found on the part of United.

In the contractual agreement between Dobbs Houses and United, the indemnification provision of Paragraph 13 (416a) provides as follows:

> "13. INDEMNITY: Caterer agrees to assume all risk of loss and to indemnify and hold United, its officers, agents and employees, harmless from and against any and all liabilities, demands, claims, suits, losses, damages, causes of action, fines, or judgments, including costs, attorney's and witnesses' fees and expenses incident thereto, for injuries to persons, damage or destruction of property (including property of United) arising out of or in connection with this agreement unless caused by the gross negligence or wilful misconduct of United, its officers, agents or employees. In the event that any demand or claim is made or suit is commenced against United, United shall give prompt written notice thereof to Caterer and the Caterer shall have the right to compromise or defend the same to the extent of its own interest."

The salient language in the indemnity provision herein is that:

> "Caterer agrees to assume all risk of loss and to indemnify and hold United . . . harmless from and against any and all liabilities . . . including costs, attorney's and witnesses' fees and expenses incident thereto, for injuries to persons . . . arising out of or in connection with this agreement unless caused by the gross negligence of wilful misconduct of United . . . "

It should be noted that there is nothing contained in said provision which limits its application to Dobbs Houses' negligence only. It is unambiguous and manifestly clear that Dobbs Houses is to assume all risk of loss even if United was negligent. The only limitation upon Dobbs Houses duty to indemnify United is the exception

for claims on damages caused by the gross negligence or wilful misconduct of United.

Under Georgia law, a contracting party may absolve itself from the consequences of its own negligence provided it does so in unequivocal terms. Southern Railway Company v. Brunswick Pulp & Paper Co., 376 F. Supp. 96, 100 (S.D. Ga. 1972); Robert & Company Assoc. v. Pinkerton & Laws Co., 120 Ga. App. 29, 1969 S.E.2d 360 (Ct. App., Div. 3, 1969).

The keystone Georgia case concerning interpretation of indemnity agreements is Robert & Company Assoc. v. Pinkerton & Laws Co., id. In that case, plaintiff and defendant were parties to a contract which included an indemnity provision. Defendant refused to assume the defense of an action on behalf of plaintiff and plaintiff settled. It was held that defendant was liable to the plaintiff pursuant to the indemnity agreement.

The relevant portions of the indemnity agreement were stated by the Court [id., 169 S.E.2d at 363]:

> "Pinkerton . . . agreed to 'be responsible . . . for all injury or damage of any kind resulting from this work, to persons or property' and also agreed specifically to '. . . indemnify and save harmless . . . Robert & Company Associates, from and against all claims or actions, and all expenses incidental to the defense' in ' any way connected with the work performed under this contract' and to 'assume and pay for, without cost to . . . Robert & Company Associates, the defense of any and all claims, litigation and actions'. [Emphasis supplied by the Court.] We think the language of this agreement can leave no doubt that it was the intention of the parties that Pinkerton should indemnify Robert & Company Associates irrespective if whether any claim arose by reason of the negligence of Robert & Company Associates, or for other reasons."

It should be noted that nothing in the foregoing indemnity agreement made any specific reference to Robert & Company Associates' own negligence. The overriding factor in the agreement in litigation is that Dobbs Houses knowingly agreed to assume all risk of loss arising out of or in connection with the agreement and to indemnify United unless such damage was caused by United's gross negligence or wilful misconduct. In Pinkerton & Laws Co. v. Robert & Company Associates, 129 Ga. App. 881, 201 S.E.2d 654, 657 (Ct. App., Div. 2, 1973), the Court reasserted its ruling that Pinkerton's liability to Robert & Co. would exist regardless of any negligence on the part of Robert & Co.

The indemnification provision herein is also applicable when a United employee is injured as clearly set forth in the case of Georgia Ports Authority v. Central of Georgia Railway Co., 135 Ga. App. 859, 219 S.E.2d 467 (Ct. App., Div. #1 1975). The Court therein stated that [id., 219 S.E.2d at 471]:

> "The words of the agreement stated that the Ports Authority would 'indemnify and save harmless the Railway from and against any and claims, demands, suits, or judgments for sums of money, to any person, corporation, firm as individual, accruing for loss of life, or injury or damage to person or property . . .' (Emphasis supplied.) If this phrase is held to include all persons except Central of Georgia employees, it would introduce an ambiguity into an otherwise unambiguous phrase . . . We are satisfied that the railroad company, by the language, was indemnified against liability to its own employees . . . "

Accordingly, it is respectfully submitted that, as a matter of law, the indemnification provision contained in the agreement between Dobbs Houses and United clearly and unequivocally requires Dobbs Houses to indemnify United for its defense of this action.

Therefore, it is further respectfully submitted that the lower Court clearly erred in dismissing United's counterclaim against Dobbs Houses.

Certainly, the award of costs, expenses and attorneys' fees to a party forced to defend against a claim by another party where the latter, pursuant to the provisions of an indemnity agreement owed a duty to defend the former is not novel.

The case of North Central Airlines, Inc. v. City of Aberdeen, S.D., 370 F.2d 129 (8th Cir. 1966) is illustrative. In this case, a passenger commenced an action against the airline as the result of injuries she sustained when she fell in the Aberdeen, S.D. Airport terminal after she had disembarked from a North Central flight.

Since the City of Aberdeen was the owner/lessor of the airport terminal, the airline commenced a third-party action against the city for indemnification on the ground that the city was negligent in maintaining and keeping the terminal building in good repair. The City of Aberdeen pleaded a general denial to the third-party complaint and further counterclaimed against North Central for attorneys' fees, costs and expenses pursuant to the indemnity agreement contained in the lease. The indemnity agreement read as follows [id. at 131]:

"Article X.

"Indemnity.

> The Lessee agrees to indemnify and hold the Lessor harmless from and against all liabilities, judgments, cost, damages, and expense which may accrue against, be charged to or recovered from Lessor by reason or on account of damages to the property of the Lessor or the property of, injury to or the death of any person arising from the

> Lessee's use and occupancy of and operations at the airport under any circumstances except when caused by the Lessor's sole negligence or by the joint negligence of Lessor and any person other than the Lessee.' [emphasis added.]"

After a jury verdict and entry of judgment in favor of North Central and against the passenger-plaintiff, the lower Court found that the City of Aberdeen was not negligent; that plaintiff's own negligence was the sole proximate cause of the accident; that North Central's liability to the City of Aberdeen under the indemnity agreement arose from its use and occupancy of the airport and that there were not facts adduced to conclude that the exception to the indemnity agreement was applicable.

North Central appealed the lower Court's finding that it must assume Aberdeen's attorney's fees, costs and expenses by virtue of the indemnity agreement and the Circuit Court of Appeals affirmed. The Circuit Court of Appeals further held that North Central was liable for Aberdeen's attorneys' fees regardless of the fact that Aberdeen was protected by liability insurance.

This is nothing in the public policy of New York which would preclude an award of indemnity to United. In Colon v. Automatic Retailers Ass'n. Service, Inc., 74 Misc. 2d 478, 343 N.Y.S.2d 874 (Civil Ct. of the City of N.Y., N.Y. Co. 1972), rev'd. on other grounds, 74 Misc. 2d 665, 347 N.Y.S.2d 312 (App. Term, 1st Dep't. 1973), plaintiff commenced an action against defendant, BOAC and other defendants to recover damages for personal injuries she sustained while in a restaurant located at BOAC's terminal at John F. Kennedy International Airport. The restaurant was leased by BOAC to the defendant. After a jury trial, a verdict was rendered solely against

Automatic Retailers.

The following indemnity provision was included in the lease agreement between BOAC and Automic Retailers [id. 74 Misc. 2d at 479, 343 N.Y.S.2d at 876]:

> "[Automatic Retailers] shall indemnify and hold BOAC . . . harmless from all claims and demands including but not limited to those for death, for personal injuries, or for property damage, arising out of the occupancy of the Premises . . . excepting only claims and demands arising from the negligence of BOAC . . . "

BOAC's claim for all costs, disbursements and expenses including attorneys' fees was granted despite the general language of the indemnity provision.

This litigation concerns itself with two corporations: Dobbs Houses being a nationwide and international organization specializing in preparing and loading food on flights for many airlines and United, a domestic air carrier.

In the performance of the catering contract, Dobbs Houses is required to use, operate, clean, inspect or control various United equipment without any direct control or supervision by United. Bearing this in mind as well as human error occurring from time to time, it was obviously in the contemplation of both parties to the agreement that injury or damage to persons or property during the course of Dobbs Houses' performance of the contract could occur at a time when United had no control over and indeed no way of knowing what was being done.

In brief, the contract herein between Dobbs Houses and United requires that if any injury should occur, Dobbs Houses should bear the burden of defense - unless, of course, the issue involved United's gross negligence or wilful misconduct. However, United's

gross negligence or wilful misconduct was never an issue in the primary litigation and is not now an issue.

Thus, the contract, on its face, relieves United, as one of the contracting parties, from the necessity of disproving its negligence; such issue is completely taken out of the area in controversy. Simply stated, in view of the relationship between the parties to the agreement, United was not willing to permit Dobbs Houses to use, operate, control, inspect or install United's equipment into United's aircraft without requiring Dobbs Houses to assume strict liability with respect to any injuries resulting therefrom, save for United's own gross negligence or wilful misconduct.

The Court below denied United's counterclaim with leave to reargue (517a). For the record, the Court stated that it could not see that United's contractual indemnity claim was applicable. The Court stated a hypothetic situation that if Dobbs was moving their filled buffet and it fell on the foot of a passerby - and the passerby sued United - then United would have to defend and it could get compensation from Dobbs. The Court could not see how it applied to a third-party complaint (516a).

It is respectfully submitted that if we refine the lower Court's hypothetical situation, it indeed is a proper example that Dobbs is liable to United herein. Simply stated, if we assume that the buffet herein rolled out and a passenger was injured while attempting to push the buffet back in place, the passenger could commence an action against both United and Dobbs. In turn, Dobbs and United would then assert claims against each other. Dobbs would assert a claim against United on principles of common law indemnity

and contribution and United would do likewise against Dobbs with the added claim of contractual indemnity.

Then, after a full trial, a jury finds that neither the passenger nor United was negligent in any way and that Dobbs was 100% negligent. Certainly, United would then prevail on its claim against Dobbs.

It is further respectfully submitted that the distinction in this action and the aforesaid hypothetic is purely technical and not substantive. Simply substitute the plaintiff herein for the passenger in the hypothetical situation. Obviously, as a matter of law, plaintiff, a United employee, could not directly commence an action against United so she pursued her claim against Dobbs alone. However, Dobbs did bring United into this action and both these latter parties asserted proper claims against the other. What has happened in this case and not in the hypothetical is that all parties are in this action due to a procedural legal technicality. It is respectfully submitted that it is a total non sequitur to assert that United could succeed in its claim against Dobbs if both were joined as direct co-defendants in an action but that United cannot recover because it is a third-party defendant.

Therefore, on the basis of all the foregoing, it is respectfully submitted that the law and plain common sense compels the conclusion that the Court below was clearly erroneous in dismissing United's counterclaim against Dobbs Houses regardless of whether United was negligent or not.

It is further respectfully submitted that Dobbs Houses should also assume the expense and indemnify United for the costs, expenses and attorneys' fees incurred by United relating to this

cross-appeal since such cross-appeal was the product of Dobbs Houses' unwarranted impleading of United into an action which arose out of or in connection with Dobbs Houses' performance of the agreement. See Schroeder v. C. F. Braun & Co., 502 F.2d 235, 245 (7th Cir. 1974).

POINT III

If Dobbs' Appeal Is Granted and This Court Directs a Remand For a New Trial Then, In That Event, This Court Should Sustain And Direct The Dismissal of Dobbs' Third-Party Complaint Against United and Preclude Any Amendment Thereto.

Dobbs, on its direct appeal, primarily seeks relief from this Court as to the issues between itself and the plaintiff-respondent and requests that the action be dismissed or that the action be remanded for a new trial. Essentially, Dobbs seeks dismissal of the jury verdict in favor of plaintiff-respondent as a matter of law, questions the admissability of certain evidence, claims error in the lower Court's charging the jury with the "emergency doctrine" and claims that the jury's damage award to plaintiff-respondent of $170,000.00 was excessive.

Secondarily and peripherally, Dobbs also requests that, if this action is remanded for a new trial, a new trial should be had on its third-party action against United.

Assuming, arguendo, that if this Court determines that Dobbs is entitled to a reversal and remand of this action to the Court below for a new trial, then, it is respectfully submitted, in that event, this Court should affirm the dismissal of Dobbs third-party complaint against United for the reasons already stated and further preclude Dobbs from seeking any leave to amend the third-party complaint.

The grounds for the affirmation of the dismissal of Dobbs' third-party complaint against United are clear and concise. First,

upon the evidence adduced at the trial concerning the liability issues as between Dobbs and United, the jury was clearly correct in its finding that Dobbs was 100% negligent and United 0% negligent (511a-513a). Second, the contractual agreement entered into between Dobbs and United for indemnification of United for any injuries sustained by any person during the course of Dobbs' performance of the catering agreement (616a) precludes and removes the issue of United's negligence herein as Dobbs has agreed to be held strictly liable to United with or without negligence on United's part.

The only exception to the provisions of the written indemnity agreement between Dobbs and United is that Dobbs would not be liable to United except for United's gross negligence or willful misconduct.

United is well aware that pursuant to the provisions of Rule 15 of the Federal Rules of Civil Procedure, the courts have held that a lower court can permit new issues to be presented by an amended pleading that is consistent with the judgment of the appellate court. See, e.g., Jones v. St. Paul Fire & Marine Ins. Co., 108 F.2d 123 (5th Cir. 1939); Feldman v. Connecticut Mutual Life Ins. Co., 57 F. Supp. 70 (D.C. Mo. 1944).

However, it is equally true that when a court of appeals mandate affirming a dismissal of a third-party complaint is issued without specific leave to amend, the judgment of dismissal is final and a motion in the lower court on remand to amend a third-party complaint is not entertainable. U.S. Fidelity & Guaranty Co. v. Perkins, 388 F.2d 771 (10th Cir. 1968); Sidis v. F. R. Publishing Corp., 7 F. R. Serv. 309, 15 a 24, Case 2 (S.D.N.Y. 1943).

It is respectfully submitted to this Court that, if this action is remanded for a new trial, this Court should affirm the dismissal of Dobbs third-party complaint against United and specifically preclude Dobbs from seeking leave to amend its third-party complaint to add a cause of action grounded upon United's gross negligence or willful misconduct. It is further submitted that any other remedy would be palpably unjust, unfair and would submit United to further unwarranted harassment and expense.

The prime controlling factor is that Dobbs never claimed or pleaded that United was grossly negligent or had engaged in willful misconduct in the training of its personnel or in the maintenance of its equipment. Indeed, had Dobbs even had an iota of a hope that it could adduce any evidence to sustain such allegations, Dobbs would have certainly initially pleaded such allegations in its third-party complaint or would have certainly have sought leave to amend its third-party complaint prior to or during the trial of this action. Dobbs did neither.

Equally significant is that Dobbs, on the appeal herein, simply requests that this Court direct a new trial as to the "negligence" issue between Dobbs and United.

Accordingly, it is respectfully submitted that the judgment of the District Court dismissing Dobbs' third-party complaint should be affirmed and, if this action is remanded to the lower Court for a new trial, Dobbs should be precluded from seeking leave to amend the third-party complaint.

It is further respectfully submitted that the judgment of the District Court dismissing United's counterclaim against Dobbs for

indemnity is in error and the District Court should be directed to enter judgment in favor of United and that this matter should be remanded to the District Court to determine the sole issue of costs, expenses, disbursements, witnesses' and attorneys' fees incurred by United in the defense of the primary action and in the prosecution of the cross-appeal herein.

CONCLUSION

THE JUDGMENT DISMISSING DOBBS' THIRD-PARTY COMPLAINT AGAINST UNITED SHOULD BE AFFIRMED WITH DOBBS' BEING PRECLUDED FROM AMENDING SAID COMPLAINT IF THIS ACTION IS REMANDED FOR A NEW TRIAL. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN ENTERING JUDGMENT DISMISSING UNITED'S COUNTERCLAIM AGAINST DOBBS HOUSES FOR INDEMNITY. THE JUDGMENT SHOULD BE REVERSED AND THE DISTRICT COURT DIRECTED TO ENTER JUDGMENT IN FAVOR OF UNITED. THIS MATTER SHOULD ALSO BE REMANDED TO THE DISTRICT COURT TO DETERMINE THE SOLE ISSUE OF UNITED'S DAMAGES.

Respectfully submitted,

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DONALD F. DRIVER, ESQ.,

Of Counsel

A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
SECOND CIRCUIT

KATHLEEN G. O'GEE
Plaintiff-Appellee

- against -

DOBBS HOUSES, INC.,
Defendant-Third Party Plaintiff-Appellant
against
UNITED AIR LINES, INC.,
Tiird Party Defendant-Appeleee
and Cross Appellant

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,

That on the 20 *day of* July *19* 77 *at* 1. 100 Church St; N.Y., N.Y.
2. 801 Second Aven; N.Y., N.Y.

deponent served the annexed *upon*

Brief

1. Lipsig Sullivan Mollen & Liapiakis
2. Alexander Asitschwartz & Cohen

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 20
day of July, *19* 77

Kevin E Thomas

Print name beneath signature
KEVIN E. THOMAS

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1979